IN THE SUPREME COURT OF THE UNITED STATES.

John Roehm, Plaintiff in Error,

vs.

Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

October Term, 1899.

No. 198.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN BEHALF OF JOHN ROEHM, PLAINTIFF IN ERROR.

I. HISTORY OF THE CASE.

This action was instituted at law in the Circuit Court of the United States for the Third Circuit, at Philadelphia, by Paul R. G. Horst and others, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, as plaintiffs, against John Roehm, as defendant. The case was heard under a stipulation waiving a jury, before the Hon. George M. Dallas, Circuit Judge, who made a special finding of facts, and upon the facts so found gave judgment for the plaintiffs. A writ of error was prosecuted by the defendant

in the Circuit Court of Appeals for the Third Circuit, and the judgment of the lower court was affirmed. Thereupon John Roehm filed in this court a petition for a writ of *certiorari*, which was granted (Record, page 97), and thus the cause comes on for hearing.

II. ABSTRACT OF THE PLEADINGS.

The plaintiff filed a statement of demand (Record, page 6 *et seq.*), reciting *in hæc verba* four written contracts made on August 25th, 1893, two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897. The first contract called for one hundred bales of the crop of 1896, to be shipped twenty bales per month in the months of October, November, December, January, and February. The second contract called for the same number of bales of the crop of 1896, to be shipped twenty bales per month in the months of March, April, May, June, and July. The third contract called for one hundred bales of the crop of 1897, to be shipped twenty bales each month in the months of October, November, December, January, and February. The fourth contract called for one hundred bales of the crop of 1897, to be shipped at the rate of twenty bales each month in the months of March, April, May, June, and July. The statement alleged that the hop crop is gathered in the Summer, and the months named in the contracts were the months next after the Summer months of the year of the crop.

On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners all his interest in the contracts. Upon receiving notice of the dissolution of the firm, the defendant wrote, under date of June 27th, 1896, stating that he considered the contracts as annulled. The plaintiffs replied, in effect, that the firm would perform its contracts, and in

October, 1896, made the first shipment and sent the defendant the invoice and bill of lading. Under date of October 24th, 1896, the defendant replied that he declined to receive the shipment.

The statement further alleges that the market price in New York City on that day of hops of the crop of 1896, deliverable as specified in the contracts, was seven and one-half cents per pound, and the market price on that day of hops of the crop of 1897, deliverable as specified in the contracts, was nine and one-half cents a pound, and claimed the difference between the alleged market price and the contract price.

The defendant pleaded "*Non assumpsit.*" (Record, page 15.)

III. SPECIAL FINDING OF FACTS.

(Record, pages 16-20.)

The learned judge found that the parties had entered into the contracts recited in the statement, but that when the first shipment of twenty bales had been tendered, in October, 1896, the defendant had declined to receive the hops, and further finds (Record, page 19) as follows:—

"At the time the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for 'prime Pacific Coast hops of the crop of 1896, and of eleven cents per pound for like hops of the crop of 1897; and the difference between the prices fixed by the contracts sued on and these above stated, together with interest on the sum of such differences from October 24th, 1896, to this date, are as follows:—

"Difference between contract price, 22 cents per pound, and 9 cents per pound on 200 bales, 39,200 pounds, at 13 cents per pound	$5,096 00
"Difference between contract price, 22 cents per pound, and 11 cents per pound on 200 bales, 39,200 pounds, at 11 cents per pound	4,312 00
"Interest from October 24th, 1896, to January 27th, 1896	710 30
"Total	$10,118 30

IV. ASSIGNMENTS OF ERROR.

(Record, page 88.)

First.—The learned judge erred in holding that a right of action had accrued to the plaintiff with respect to all the contracts in question at the time this suit was brought.

Second.—The learned judge erred in holding that the difference between the price at which subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and therefore must be the correct measure of the damages recoverable.

Third.—The learned court below erred in entering judgment in favor of the plaintiff and against the defendant in the sum of $10,118.20.

V. BRIEF OF ARGUMENT.

FIRST.

Of the Anticipatory Breach.

This action was brought for the recovery of damages for the alleged breach of four separate, distinct, and independent contracts of sale, upon the refusal to accept delivery of a single one of five parcels under the first contract, and before the time for final performance had arrived. At the time of suit, January 23d, 1897 (Record, page 2), four parcels were to have been delivered and accepted, and at the time of trial, December 13th, 1897 (Record, page 3), the only parcels deliverable up to that time were those covered by the first two contracts for hops of the crop of 1896 and two parcels for the crop of 1897. The trial judge felt that it was his duty to follow the rule first established in Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, and to allow a recovery for breaches of contract to accept and pay for goods before the time fixed by the contract for their delivery.

It is conceded that this ruling is in accordance with the decisions of the English courts and of the courts of many of the States in this country, but it has never yet been sanctioned and adopted by this court.

In the Circuit Court, Judge Dallas thus disposed of the question (Record, pages 21, 22):—

"This case is within the rule laid down in Hochster *vs.* De la Tour, 2 El & Bl., 678, and the other English cases cited in Dingley *vs.* Oler, 117 U. S., 502. In the case last mentioned the Supreme Court, after remarking that the rule referred to had been followed by the courts of several of the States, but had been denied by the Supreme Judicial Court of Massachusetts, declined to decide whether or not it should be maintained 'as applicable to the class of cases' to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of Hochster *vs.* De la Tour to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now presented. But, assuming the broad question to have been left open by the Supreme Court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. Norrington *vs.* Wright, 115 U. S., 206.

"In my opinion, the argument of the court in Daniels *vs.* Newton, 114 Mass., 530, was well and sufficiently answered in Dingley *vs.* Oler (11 Fed., 372). What is there said need not be repeated at length, but I may remark that I concur with the learned judge in thinking that the several State decisions cited by him (to which others might be added) as in conflict with Daniels *vs.* Newton, are 'founded in good sense and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.'

"Since the decision of Dingley *vs.* Oler, the Circuit Court of Appeals for the Sixth Circuit has in two cases (in both of which Dingley *vs.* Oler was cited) stated the law to be that—

"'Where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms. * * * Brewing Co. *vs.* Bullock, 50 Fed., 87. Lumber Co. *vs.* Alley, 43 U. S. App.,

175. In the absence of any controlling solution of the question by the Supreme Court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell in Dingley *vs.* Oler, as well as by the English authorities and by the judgments of the courts of several of the States."

In the opinion of the Circuit Court of Appeals, delivered by his Honor Judge Kirkpatrick (Record, pages 92-96), it is said:—

"Under these circumstances, the plaintiffs were justified in accepting these declarations as an anticipatory breach of the unperformed provisions of the contract, and were not obliged to make further tenders nor wait until the expiration of the time for making the latest deliveries under it before bringing their suit. While the Supreme Court of the United States in Dingley *vs.* Oler, 117 U. S., 490, declined to affirm the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 673, the general consensus of opinion of courts of concurrent authority is in accordance therewith. In the recent case of Marks *vs.* Van Eegan, 85 Fed. Rep., 853, Wallace, C. J., after a careful review of all the authorities, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, says: 'In view of the overwhelming preponderance of adjudication, we think it must be accepted as the settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and if the latter elects to treat the contract as terminated, his right of action accrued at once.' That the right to begin an action carries with it the right to obtain judgment, needs no argument."

In Dingley *vs.* Oler, 117 U. S., 490, Mr. Justice Matthews says (at page 502):—

"The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in Hochster *vs.* De la Tour, 2 El. & Bl., 678; Frost *vs.* Knight, L. R., 7, Ex., 111; Danube & Black Sea Railway Co. *vs.* Xenos, 11 C. B. N. S., 152, and which in Roper *vs.* Johnson, L. R., 8, C. P., 167, 178, was called a novel doctrine, followed by the courts of several of the States: Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; Fox *vs.* Kitton, 19 Ill., 519; Chamber of Commerce *vs.* Sollitt, 43 Ill., 519; Dugan *vs.* Anderson, 36 Maryland, 567; Burtis *vs.* Thompson, 42 N. Y., 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in Daniels *vs.* Newton, 114 Mass., 530, and never applied by this court. Accordingly the right to maintain the

present action was justified upon the principle supposed to be established by those cases.

"The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs: for, upon that construction, this case does not come within the operation of the rule invoked.

"In Smoot's Case, 15 Wall., 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st ed., 424; 2d ed., section 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient: it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'

"We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery *vs.* Bowden, 5 El. & Bl., 714; S. C., 6 El. & Bl., 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone *vs.* Milling, in the Court of Appeal, 16 Q. B. D., 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party."

Dingley *vs.* Oler, 117 U. S., 490, 502.

The question has come several times before the other Federal courts of the country, and in Marks *vs.* Vaneeghen, 85 Fed. Rep., 853 (57 U. S. Appeals, 149), Wallace, C. J., said:—

"It was decided in Daniels *vs.* Newton, 114 Mass., 530, that the action does not lie before the expiration of the time of performance, and recently that case was followed in Clark *vs.* Casualty Co., 67 Fed., 222. The question has never been decided by the Supreme Court of the United States, and the observations in the opinions in Smoot's Case, 15 Wall., 36, and Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, were *obiter*. In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrued at once. The latter, how-

ever, must elect whether he will treat the contract as terminated, or as still existing; and if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the existing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract. The English authorities in support of these propositions, beginning with the leading cases of Hochster *vs.* De la Tour, 2 El. & Bl., 678, are unanimous. Frost *vs.* Knight, L. R., 7 Exch., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Johnstone *vs.* Milling, 16 Q. B. Div., 460. The doctrine of these authorities has been adopted and approved by the courts of this country in numerous adjudications. Brewing Co. *vs.* Bullock, 8 C. C. A., 14, 59 Fed., 83; Howard *vs.* Daly, 61 N. Y., 362; Ferris *vs.* Spooner, 102 N. Y., 10, 5 N. E., 773; Windmuller *vs.* Pope, 107 N. Y., 674, 14 N. E., 436; Nichols *vs.* Steel Co., 137 N. Y., 471, 33 N. E., 561; Fox *vs.* Kitton, 19 Ill., 519; Engesette *vs.* McGilvary, 63 Ill. App., 461; Railway Co. *vs.* Richards, 152 Ill., 59, 38 N. E., 773; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; McCormick *vs.* Basal, 46 Iowa, 235; Platt *vs.* Brand, 26 Mich., 173; Sloss Co. *vs.* Smith, 11 Ohio, 312; Kalkhoff *vs.* Nelson, 60 Minn., 284-287, 62 N. W., 332; Davis *vs.* Furniture Co., 41 W. Va., 717, 24 S. E., 630.

"In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of their action."

Again, in

Pierce *vs.* Railroad Co., 173 U. S., 1, 12,

Mr. Justice Gray says:—

"It is proper to remark that the point decided in Daniels *vs.* Newton, 114 Mass., 530, was left open in Dingley *vs.* Oler, 117 U. S., 490, 503, and has never been brought into judgment in this court."

On the other hand, in Clark *vs.* The National Benefit and Casualty Co., 67 Fed. Rep., 222, Judge Priest said:—

"The plaintiff then invokes the much-contested rule that where one of the parties to a contract of an executory character, before the time for performance, renounces it, or places himself in an attitude of impossibility of performance, the other may treat such action as a breach and sue at once as for a breach of the entire contract, although the time when he might require performance had not yet arrived. This view rests upon the reasoning and precedent of the case of Hochster *vs.* De la Tour, 3 El. & Bl., 678, and has never been approved or fol-

lowed by the Supreme Court of the United States. All the intimations of that court are in opposition to such a rule.

"Thus in Smoot's Case, 15 Wall., 36-46, Mr. Justice Miller, speaking for the court, said:—

"'As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And, while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed.'

"In the subsequent case of Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, the disposition of the court, though not deciding the question, appears to be strongly in sympathy with the views of the Supreme Court of Massachusetts, so ably expressed in Daniels *vs.* Newton, 114 Mass., 530, upon a careful consideration of the more prominent of the preceding cases. The views of the Massachusetts court in the case *supra* appear to me to be more consonant with reason and the spirit of the law, and would in this case preclude any recovery by the plaintiff, upon the idea of a recovery as for a breach of the entire contract."

Clark *vs.* National Benefit & Casualty Co., 67 Fed. Rep., 222, 225.

While it is true that the English rule has been frequently approved by the courts of this country, it is a little remarkable that, with two or three exceptions, to which attention will be hereafter particularly called, there has not been, in any of the opinions, a careful discussion of the question upon principle, and it is submitted, therefore, that the rule should not be adopted by this court without an examination of the reasons given by its authors at the time of its invention. It is believed that it will be found that the innovation was first made in cases of an exceptional character, for reasons applicable to the peculiar facts then involved, and it was then incorporated into the general law of executory contracts, without adverting to the exceptional reasons which had originally suggested it.

Hochster *vs.* De La Tour, 2 Ell. & Bl., 678, was the case of a courier The contract was one for hiring for three months from June 1st, 1852, and on May 11th, 1852, the defendant wrote and declined the services of the plaintiff, who began his action May 22d, 1852. On the argument

of the rule to enter a nonsuit or arrest of judgment, the plaintiff's counsel correctly said that the question was "whether it is possible to break a contract before the day for its performance comes."

It must be conceded that the weight of authority down to that time was against the contention. The statement of the law by Baron Parke* in Phillpotts *vs.* Evans, 5 M. & W., 475, is conclusive as to what the law had been theretofore. That was a contract for the delivery of wheat, and the buyer gave notice that he would not accept. It was held that the measure of damages was the difference between the contract price and the market price on the day of tender, and not on the day of receiving notice. Mr. Baron Parke said (page 477):—

"If Mr. Richards could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damage would be according to the price at the time of the notice. *But I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and,* vice versa, *the plaintiffs could not sue him before.* The same rule was adopted in the case of Startup *vs* Cortazzi, 2 C. M. & R., 165. The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract. I think, therefore, that the damages have been calculated according to the proper principle, and that there should be no rule."

The opinion of the court in Hochster *vs.* De la Tour was delivered by Lord Campbell, and the true *ratio decidendi* is to be found at pages 69, 70, as follows:—

"If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise 'to start with the defendant on such

* "Probably the most acute and accomplished lawyer this country ever saw."—Lord Blackburn, L. R., 7 C. P., 554.

travels on the day and year,' and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract."

In other words, it would be extremely hard upon the plaintiff, and really prejudicial to the defendant, that the action should not be brought in advance of the time of performance, as otherwise the servant would be obliged to remain in idleness in order to prove his readiness to perform, and no possible wrong could be done to the defendant except that if the time of service under the contract had not expired before suit brought, the plaintiff might recover full damages, and afterwards secure employment from another master. Whether the reason given be good or bad, the rule there established was a perfectly plain case of judge-made law.

The question was incidentally considered and the doctrine recognized in the case of the Danube and Black Sea Company *vs.* Xenos, 11 C. B. N. S., 103, E. C. L., 152, though the refusal was continued and the suit was not brought till after the date of the performance; but there was no discussion of the subject in the opinion, either in the Court of Common Pleas or in the Exchequer Chamber.

The question next arose in Frost *vs.* Knight, which came before the Court of Exchequer upon a rule for a new trial, in L. R., 5 Ex., 322. That was an action for breach of promise to marry on the death of the defendant's father, who was still alive at the time of the trial. In the Exchequer, Chief Baron Kelly delivered an opinion which was certainly not answered by Chief Justice Cockburn, but which has been comparatively lost sight of. He prefaces his argument as follows:—

"Nothing can be more certain, as a matter of fact, than that a promise to marry upon an event which has not yet happened is not broken

by the defendant declaring that he will not perform his promise. If it can be called a breach at all, it is a promissory or prospective breach only: a possible breach, which may never occur, and not an actual breach. * * * To say that the contract is broken is simply to utter an untruth. One contracts in 1870 to pay to another £1000 on the 1st January, 1871. To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue. It seems equally clear and unconvertible in fact that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive. Yet these decisions have now made it law that a promise to do an act at a future day, or upon an event which has not yet occurred, is broken by a declaration to the promisee that it will be broken or will not be performed. And we are bound by these decisions, one of them having been pronounced in the Exchequer Chamber. It is necessary, therefore, to consider whether their authority extends not only to the contracts to which they related, and others of the like nature, but to a contract of a totally different character and peculiar to itself, like a contract to marry."

He next discusses the cases to which Lord Campbell had referred, and concludes that—

"The judgment as delivered by Lord Campbell will be found, when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June and lose the opportunity of obtaining another engagement, or to accept any other engagement that might be offered to him, and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement."

He then proceeds to show that Hochster *vs.* De la Tour was "not only unsupported by any previous authority, but directly opposed to the principle of several cases to which it is now necessary to advert."

In the Exchequer Chamber, L. R., 7 Ex., 111, the opinion was delivered by Chief Justice Cockburn, who thus explains Hochster *vs.* De la Tour, pages 113, 115:—

"The considerations on which the decision in Hochster *vs.* De la Tour, 2 E. & B., 678, is founded are that the announcement of the contracting party of his intention not to fulfill the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including

non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

"It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in Hochster *vs.* De la Tour proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

"The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

"It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor and taking timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished."

He further points out that a promise to marry creates a *status* or condition of betrothment, and this view was enforced by Mr. Justice Byles, in his concurring opinion,

who contended that the breaking off of a mutual engagement to marry amounted to a breach of contract by putting an end to the condition of betrothment, which, according to the contract, was to continue.

These cases might very well, therefore, be sustained upon their particular facts as exceptions to the general rule; but the assertion by the Chief Justice that "a party to the contract has the right to have it kept open as a subsisting and effective contract" (which is repeated by Miller, J., in Dugan *vs.* Anderson, 36 Md., 567) is unsustained by authority and entirely inconsistent with principle, and no case can be found in which any judge ever allowed damages to be assessed by way of compensation for the failure to keep the contract open as a subsisting and effective contract. A business man may look upon his outstanding contracts as an asset, but the only compensation he can recover, and the only right which the law will enforce, is for the pecuniary damages resulting from the breach, but for the loss of the shadowy, sentimental right to have a continuing recognition of the contract as such, the law gives no remedy. Even in the cases referred to, the measure of damage is still said to be the compensation for the refusal to perform at the time fixed by the contract, and no one has ever suggested that the measure of damages for an anticipatory breach differed, except in so far as in one case the jury would be obliged to guess, whereas in the case of an actual breach they would be able to base their verdict upon facts instead of conjecture. The illustration of Mr. Justice Wells in his opinion in Daniels *vs.* Newton, 114 Mass., 530, 532, of the case of commercial paper, is unanswerable. No renunciation of his obligation to meet his note would render the maker liable before the day fixed for payment, and, upon principle, it is impossible to distinguish between a promise to pay negotiable paper and the promise to pay for goods when and as delivered. The opinion of Mr. Justice Wells contains a thorough discussion of all of the authorities down to date, and he concludes by saying:—

"Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought

to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him his right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed."

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"That this is the natural and ordinary rule seems to be recognized by Lord Campbell when he declares that 'it cannot be laid down as a universal rule,' and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true 'that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived.' L. R., 7 Ex., 114. But a preceding 'inchoate right' is discovered, and a corresponding obligation implied, upon which there may be held to be a 'breach of the contract when the promisor repudiates it and declares he will no longer be bound by it.'"

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"These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and, so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement, 'by reason of the future non-performance,' will be 'virtually involved,' 'as one of the consequences of the repudiation of the contract,' it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts having a future day for their performance include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfillment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where

the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days, at least, within which to fulfill their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect to that agreement of sale. This action, therefore, cannot be maintained."

Daniels *vs.* Newton, 114 Mass., 530-539.

In other cases, both in England and in this country, the judges have contented themselves with treating the two leading English cases as binding authorities, and there has been no serious consideration of the question upon principle and no critical discussion of the authorities. Extracts from the opinions are given in the foot note of all which go beyond the mere citation of the two leading English cases.*

* In Holloway *vs.* Griffith, 32 Iowa, 409—an action for an anticipatory breach of contract to marry—the court adhered to its earlier decision in 19 Iowa, 179, saying: "The rule we deem sound and just, and too well settled to be now called in question."

In Grau *vs.* McVicker, 8 Bissell, 13, 16, which was an action upon a contract of lease, Drummond, J., says:—

"The second objection, as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible under the lease, conceding that he had given notice to McVicker before, that he could not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or, as it is called in the books, a *locus poenitentiae*. Some authorities declare that in law there is this *locus poenitentiae*, and that a party shall have a chance to recant, and say, 'I was wrong, but when the time comes I will perform my contract.' Undoubtedly, there are authorities which declare that there cannot be a breach of contract, strictly so-called, until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874, because that was the date of the commencement of the contract. There are other authorities, however, which hold the con-

The learned Circuit Judge says that in his opinion the argument in Daniels *vs.* Newton is well and sufficiently answered by Judge Lowell in Dingley *vs.* Oler, 11 Fed. Rep., 372, but upon a careful examination of the opinion of Judge Lowell it will not be found to merit this high commendation. Alluding to the suggested case of the negotiable note, he admits that it would be difficult to apply the rule or to find any damages in a case of the extreme simplicity and singleness of that supposed, but he offers really no argument in support of his decision.

The illustration drawn from the case of negotiable paper is, however, a conclusive answer in all cases of ordinary commercial contracts. Take an executory contract to sell, where the buyer gives his notes in advance, payable, successively, at the dates of deliveries. Would it be contended that suit can be brought either on the notes or on the contract immediately upon a renunciation in advance of the obligation to take the goods and pay the notes? But if not, it is impossible to distinguish such a case on the one hand from the giving of a promissory note, without

trary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And the chief importance, perhaps, of this case is that it becomes necessary to determine, in the midst of the conflict of authority upon this subject, whether, in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874, and I have come to the conclusion that there may be such breach.

"I think that the principles decided in the case of *Hochster* vs. *De la Tour*, reported in the 20th English Law and Equity Reports, 57, are sound. * * * The unanimous opinion of the court was that the action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September

more, or from an agreement to pay the price, without more, as usually expressed in an ordinary contract of sale.

When the promise is nothing but a promise to pay

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as that the action could not be maintained for a breach prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case, and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make—whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if, in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not have the weight that I then supposed, namely, that the *status* of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary, it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup.

In Burtis *vs.* Thompson, 42 N. Y., 246, 250, Grover, J., said:—

"Any conduct by a party who has promised to marry another that will render the contract no longer obligatory upon that other, is a violation of the duty and obligation created by the contract, and may therefore be treated by the injured party as constituting a breach. Clearly, notifying the other party of a settled determination not to perform the contract is such an act. Annoying and distressing the feelings of the plaintiff in this way, whether the defendant was in earnest or not, fully justified the plaintiff in treating the contract as broken by the defendant. The plaintiff's (defendant's?) counsel insists that if this is the law to be applied in the present case, it will follow that the maker of a note due at a future day will make himself liable to an action instantly by declaring to the holder that he will

money, it is plain to every lawyer that the announcement of an intention not to perform that promise can give no new rights to the promisee, because he has nothing to do

never pay it. This conclusion does not at all follow. *In the case of such a note, the holder is in no respect damnified until payment is withheld after it is due. Until this happens, no legal right of his has been violated by the maker.* Not so in the present case. The defendant in a legal sense had rendered it certain that the plaintiff had lost absolutely all benefit to be derived by her from the contract. He had wrongfully caused her all the distress of wounded feelings that a breach by him at the day would inflict, which is an essential consideration in estimating her damages. In Hochster *vs.* De la Tour (20 Eng. L. & Eq.), it was held that a party who had contracted with another to enter his service as a carrier (*sic*) on the first day of June thereafter, became liable to an action before that day by giving notice of his refusal to employ him according to the contract. While not fully prepared to concur in the judgment in this case without further consideration, yet the reasoning of the learned judge, when applied to the facts in the present case, clearly shows the correctness of the charge upon the point under consideration."

In Howard *vs.* Daly, 61 N. Y., 362, an action for breach of contract of service, Professor Dwight, acting as commissioner of appeal, reviews the English cases, and concludes that "the rule in Hochster *vs.* De la Tour is universal in its application to contracts to be performed at a future day," but adds, "I presume it would scarcely be extended to mere promises to pay money or other promises of that nature, where there are no mutual stipulations."

The question was incidentally involved in Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442-446, where the reasoning of Hare, J., is against the right to maintain the action in the present case, although he expresses the opinion that the rule of Frost *vs.* Knight will prevail in the United States. He says:—

"*It is no doubt true in general that a suit will not lie on the day on which default is made in the performance of a pecuniary obligation. The cause of action is not complete on a promissory note until the morning after the last day of grace, and the principle is the same in the case of a bond. This is not because a man who is injured cannot seek redress immediately by suit, but because non-performance is not an injury until the time for fulfillment has expired.* If a man removes or converts the goods of another, the latter may proceed at once in trover or replevin; and so when a vendor refuses to deliver the goods, notwithstanding a tender of the price. In like manner a man who should promise to pay a sum certain at noon on a given day, could not complain that a writ issued the next hour was premature. It follows that when a purchaser refuses absolutely to accept or pay, the vendor may proceed forthwith in debtor *assumpsit*."

but to receive payment—and Judge Lowell apparently concedes this—but it is entirely sufficient for the protection of the party receiving such a notice in every other case, to relieve him from the duty of performance on his part without creating a new contract by accelerating the day of performance and payment. What consideration does he give for the creation of new rights and the imposition of new liabilities, and upon what principle is it that it is left optional with him to retain the old contract or make a new one at his pleasure? The rule heretofore was that upon notice of repudiation he might rescind, in which case the mutual promise was a consideration, or at his election he might enforce; but to allow him to recover damages for the breach of the contract in advance of the time of performance, is to give him more than compensation, and to impose more than damages upon his adversary.

It should be further pointed out that the rule relieves the seller from all risk and cost. If nothing had occurred leading the defendant to decline to take the hops, the plaintiffs would have been bound, even if they had made forward contracts, to run the risk of performance on the part of their vendors. Dealing in a commodity of fluctuating value, there would have been constantly the risk in respect to solvency and the willingness to deliver. Assuming a contract running over many years, the obligation of a vendor in California or the Philippines would be of very uncertain value, and yet, according to the rule adopted by the learned judge, the seller may relieve himself from all risks of non-performance on the part of his vendors, without even going to the trouble of making a formal contract, and proving that he could have bought at the bottom of the market, and thereby establish a standard of value. This is to put the plaintiffs in a far better position than if the contract had been performed, and to reward them for having the contract broken; and this, too, in the face of the fact that they unquestionably would have the right, under the authorities, to refuse to acquiesce in the renunciation, and to hold the contract open until the time of performance.

It may also be observed that the adoption of the rule in cases like the present, gives to the plaintiff in actual practice much more than he is entitled to have. In fixing the contract price for forward deliveries, the vendor must always charge for the risks of the market, and the other risks of business, while the defendant had certain chances to the benefit of which he was lawfully entitled. The vendor ran the risk of not being able to buy the article he had contracted to deliver, or of loss in transportation, and of the ultimate solvency of the buyer, all of which risks entered into the price. All these chances are eliminated, and the defendant, instead of being called upon to pay the damages fairly resulting from his refusal to take each successive delivery, is required to make a lump payment in advance, covering the aggregate estimated losses. This is giving the vendor more than compensation, and depriving the purchaser of the chances to which he is entitled, of being relieved from an onerous and oppressive bargain, and of the protection of the long-established rule of law which limited the measure of damages he could be required to pay in case of his inability or unwillingness to accept performance. This limitation was an integral part of the contract, and may have been the essential consideration for entering into an agreement running over so long a term of years. He might well argue that if there should be, as there was, an abnormal decline, the market would subsequently rally, and the average would nearly be maintained, but he might never have consented to take the risk of having his responsibility fixed by a speculative price at a single date, though the times of deliveries were to extend over years. The contract was made in 1893, and some of the deliveries were not to be made till 1898. It might as well have been for deliveries over fifty years. As a rule, in every cycle of ten years, market prices go from one extreme to the other. If the vendor, in case of breach, can get another forward contract, that is very well for his protection, and there is no reason why he should not be allowed to do so, but it affords no warrant for depriving the buyer of the chances

of the market, and for fixing his loss by a purely artificial quotation in the speculative exchanges of the country, instead of the difference between the contract price and the actual market price at the time of each delivery. The full compensation of the vendor would be made complete if he were allowed to tender each parcel as it became due, and if he had been fortunate enough to provide himself in advance at low prices, so much greater would be his profit; but the buyer should be no more required to pay in advance the aggregate sum of all the differences than the aggregate sum of all the installments of purchase money. It is not like the case of a manufacturer who has been relieved from the duty of needlessly producing an article rejected before making, where he would be obliged to expend the entire cost with the certainty of having no customer to accept and pay, for in the case of a simple contract of sale, the vendor is put at no disadvantage by reason of the renunciation on the part of the buyer by being obliged to wait for his profit until it has become due and payable by the terms of the contract. In a proper case, notice of a refusal to accept may excuse failure to perform, as prevention is always an answer to the plea of the want of readiness to perform; but as the action for an anticipatory breach is avowedly intended to put the parties in the same condition as they would have been in upon a failure to perform at the maturity of the contract, there is no collateral reason, as in the case of a servant, or of the betrothed woman, to give this compensation before the aggrieved party is entitled to it by the terms of his contract.

SECOND.

OF THE MEASURE OF DAMAGES.

In discussing the measure of damages, Judge Kirkpatrick says:—

"In an action upon an ordinary contract for sale and present delivery, the damage is measured by the difference in price as fixed by the contract and the market value at the time of delivery; but that

this is not a general, invariable rule is apparent from the fact that it cannot be made to serve as a measure of damages in a case like the one at bar, where there is need for an immediate ascertainment, though delivery, by the terms of the contract, was not to be made until after the rendition of the judgment. The rule was no doubt adopted because in cases where applicable, it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case, other means must be employed, the courts do not hesitate to adopt a different rule. Thus, in Huntley *vs.* The Pittsburg Bessemer Steel Company, 121 U. S., 264, where a contract was made for steel rails of a peculiar kind, which the plaintiffs were prevented from manufacturing and delivering by the misconduct of the defendant, the court held that 'the proper rule of damages was the difference between the cost per ton of making and delivery and the contract price."

"The basis of recovery was said to be the gain which the plaintiff would have had if permitted to complete the contract. The damages of the plaintiffs in this case should be assessed upon the same principle—that of the gain there was to him in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops delivered according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar liabilities. The objection on the part of the plaintiff (defendant) that he was entitled to the benefit of the market at each due date of delivery is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made necessary an antecedent ascertainment of the damages, and is bound to accept the situations caused by his own wrongdoing. Anvil Mining Co. *vs.* Humble, 153 U. S., 540.

"The record shows at what price such subcontracts as above referred to were obtainable, and judgment was rendered in accordance therewith."

It has always been recognized that in an action for an anticipatory breach of contract it is extremely difficult to arrive at the true measure of damages. In the case of the servant, the jury must guess as to his chances of obtaining employment. In fact, in Hochster *vs.* De la Tour he had secured a new engagement before trial. In the case of the betrothed woman they would be obliged to guess as to her chances of getting married in the interval, but that would be no more difficult than in the ordinary case of an actual breach, when the chances of future marriage should always be taken into account.

But in the ordinary action for failure to take and pay for goods the measure of damages is the difference between the contract and market price, of which the best evidence is a public sale, or a sale in the regular course of trade at the full market rate, after notice. In such a case the goods must be shown to be of the quality contracted for, and the price obtained upon resale is, of course, a fair test of market vaule. The difference between what the plaintiff gets from the resale and the contract price is exactly and precisely the compensation to which he is entitled. The verdict puts him exactly where he would have been if the purchaser had taken and paid for the goods.

In Brown *vs.* Muller, L. R., 7 Ex., 319, the plaintiff bought iron, to be delivered in about equal proportions in September, October, and November. In August the defendant gave notice that he did not intend to deliver. In December the plaintiff began his action for non-delivery, and it was held that the proper measure of damage was the difference between the contract and market prices of one-third of five hundred tons on the 30th of September, the 31st of October, and the 30th of November respectively.

Chief Baron Kelly said:—

"It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or, at all events, when the first breach took place and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or, again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Sup-

pose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible."

Brown *vs.* Muller, L. R., 7 Ex., 319-322.

In Roper *vs.* Johnson, also (L. R., 8 C. P., 167), it was contended by the counsel for the defendant that the plaintiff should have gone into the market immediately upon the breach and obtained a similar contract. It will be observed that the action was by the buyer for refusal to deliver. In the course of the opinion of the court it is intimated that the defendant might have given evidence that another contract might have been obtained on better terms on the day of the notice of the refusal to accept, but that in the absence of such evidence the true measure of damage was the market price upon the day appointed for performance. The remarks of Mr. Justice Brett are so directly in point that they may be quoted at length:—

"This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times, and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods the rule as to damages for breach of the contract to deliver is the difference between the contract price and the market price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in Brown *vs.* Muller, Law Rep., 7 Ex., 319, to deliver goods in certain quantities on different days. The effect of the judgment in that case is that the contract being wholly unperformed, there is a breach—a partial breach—on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of

the several portions of the contract. But the case of Hochster *vs.* De la Tour, 2 E. & B., 678, 22 L. J. (Q. B.), 455, introduced this qualification, that where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here; the contract being for the delivery of the goods on future specified days, the defendant has, before the time appointed for the last delivery, declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

"Now, to entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach. These are two quite distinct. All that Hochster *vs.* De la Tour, 2 E. & B., 678; 22 L. J. (Q. B.), 455, decided was this, that if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract and sue for it. Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of breach. It appears to me that what is laid down by Cockburn, C. J., in Frost *vs.* Knight, in the Exchequer Chamber Law Rep., 7 Ex., 111, involves the very distinction which I am trying to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages: ***and that when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach.*** Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: 'The promise, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining

to complete it.' He then treats of the other case: 'On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time,' that is, from non-performance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz., *that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract.* Then he goes on and shews the real distinction between the cases he has put. 'Subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss.' He says further: 'The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract: and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done whereby his loss has been or would have been diminished.' He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz., 'ought to have done.' It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper measure of damages; leaving it to the defendant to shew circumstances which would entitle him to a mitigation. No such circumstances appeared here; there was nothing to shew that the plaintiffs ought to have or could have gone into the market, a rising market, and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was

upon precisely the same argument that the Chief Baron in Brown *vs.* Muller, Law Rep., 7 Ex., 319, decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance; but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority I should have come to the same conclusion. But I think we are bound by the authority of Frost *vs.* Knight, Law Rep., 7 Ex., 111, and Brown *vs.* Muller, Law Rep., 7 Ex., 319."

As already noted, the action in Roper *vs.* Johnson was by the buyer for refusal of the seller to deliver the coal he had agreed to furnish. What is said as to the possibility of the defendant mitigating the damages by offering evidence to prove that the plaintiff could have provided himself with other forward contracts is purely *obiter*, but rests on the familiar rule that the party aggrieved must reduce the damages so far as possible. The plaintiffs claimed that they needed the coal for consumption, and it was argued that it was their duty to supply themselves by taking contracts at lower prices, if able to do so, but it is difficult to see why they had not the right to take the risk of the market and to defer supplying themselves from month to month until the coal was actually needed. What was actually decided was, that if evidence could have been produced to prove that forward contracts could have been obtained, the burden rested upon the defendant to prove the fact, but it was not decided that if such evidence had been tendered it would have been competent, and in the opinion of Kelly, C. B., it would not have been.*

But the case of the buyer who needs goods for use and neglects to provide himself elsewhere, and to mitigate the damages, when the chance offers, is very different from the present, where the seller claims that he could have bought forward contracts in advance, and could have thus quali-

* In the case of L. S. & M. S. Ry. Co. *vs.* Richards, 152 Ills., 59, however, the question came up for decision, and it was *held* that the vendor, not being bound to accept the notice of renunciation, was not required to resell the grain on hand or make a forward contract, but might treat the contract as still in force.

fied himself to make the deliveries as they would have become due. This is for the purpose of aggravating, not of mitigating, the damages. According to the contract, the extent of the buyer's obligation was to take the goods as delivered, at the times and in the amounts stipulated, or to pay the difference between the contract price and what the seller could get for them from some one else upon a resale at the full market price. He is entitled to the benefit of the market at each due date, and *non constat* that the market might not advance so as to make the loss nominal. In fact, the price allowed for the crop of 1897 was two cents higher than for that of 1896, and the evidence showed that the lowest prices ruled in the Summer of 1896, after which time there had been a steady advance.

In his opinion the learned judge of the Court of Appeals does not meet, or even discuss, the objection that the plaintiffs were given their money before the date called for by the contract. It does not matter whether the defendant is a wrongdoer or not. The only damages which the plaintiffs could recover for the breach of their contract would be an amount sufficient to give them compensation, or, in other words, to put them in precisely the same position which they would have been in if the contract had been performed.

If the contract had been performed, they would not have received the purchase money until the time of payment according to the contract, and the final payment could not have been had until the tenth day of August, 1898. It is obvious, therefore, that assuming that the computation of damages was correct in all other respects, the plaintiffs were only entitled to insist on the payments which should have been made down to the date of judgment, and the defendant was entitled to a discount on all future payments down to August 10th, 1898, for the simple reason that the plaintiffs were not entitled to get their profits until the time of actual delivery. The contract price was twenty-two cents per pound, and the average damages allowed were twelve cents per pound, or twelve twenty-seconds or six-elevenths of the contract price, so that the

plaintiffs were awarded six-elevenths of the contract price as of October 24th, 1896, though the last installment was not due under the contract till August 10th, 1898. It is very apparent, also, that as at the time of the refusal to accept the first tender in October, 1896, the market was at the lowest point, and prices continued to advance down to August, 1898, the plaintiffs have been allowed to recover and the defendant compelled to pay a sum far beyond what would have compensated the plaintiffs for the actual breaches of the different contracts as they matured, and if, in addition, the defendant is required to make this payment months before the money was due according to the contract, the dangers and mischiefs of judge-made law will be manifest.

R. O. MOON,
R. C. DALE,
SAMUEL DICKSON,
For Plaintiff in Error.

APPENDIX.

After the foregoing brief had been printed, the attention of counsel was called to the case of Stanford *vs.* McGill, 6 North Dakota, 534. The opinion of Chief Justice Corliss contains so elaborate a discussion of the principles involved and so complete a review of the authorities, that it is believed that it will conduce to the convenience of the members of this court to have it appended in full:—

CORLISS, C. J. On the 3d of August, 1895, plaintiff and defendants entered into an executory contract for the sale by plaintiff to defendants of five thousand bushels of No. 1 flax, at one dollar a bushel, to be delivered at Kelso, in Traill County, in this State, during the month of September of that year. On the 7th of September following the defendants notified the plaintiff by letter that they did not recognize the binding force of the agreement, and therefore refused to carry it out on their part. This letter was received by him September 8th. At that time the plaintiff had not exercised his option to make delivery at any time during that month, as was his right under the contract. The action was to recover damages for breach of this agreement, and on the trial of the case the court directed a verdict for the plaintiff. The defendants on this appeal urge certain reasons why they should not be held liable. They insist that the crop of flax raised by plaintiff on his farm was mortgaged, and that therefore he could not give them an unincumbered title. But whether he could deliver the flax, according to his contract, free from all liens, could not be determined in advance of the actual delivery thereof. In the meantime the mortgage might be paid or the mortgagee might release the five thousand bushels from the lien of his mortgage. Had the plaintiff tendered the defendants five thousand bushels with a lien thereon, they would have been justified in refusing to receive the same; and had

he not, in proper time, delivered to them the flax free from all incumbrances, they could have held him responsible for breach of contract. But they had no right to settle for the plaintiff, in advance of the time when he was required by the terms of the contract to make delivery, the question whether he could and would deliver unincumbered flax. Moreover, the specific property to be delivered was not designated in the contract. It was not necessary that the plaintiff should deliver any of the flax raised upon his own farm. Delivery of any five thousand bushels of flax, of the quality and grade specified in the agreement would have constituted compliance with the contract on the part of the plaintiff. It is further urged that plaintiff was not able to deliver the flax, for the reason that up to the end of the month of September he had threshed only six hundred and forty-two bushels. If it should be conceded that plaintiff had not, and could not have, threshed a bushel during the month of September, this would not establish any inability on his part to comply with the terms of his agreement. A person may agree to sell property which he does not even own, and the purchaser cannot on that account insist, as an excuse for violating his agreement, that it is not in the power of the vendor to make good his promise. This fact cannot be ascertained until the day for delivery has come and passed without any delivery being made. It is claimed that plaintiff rescinded the contract by selling the five thousand bushels in Duluth on the 9th of September, two days after the defendants had written plaintiff that they would not fulfill their agreement. The question whether the contract was rescinded is so related to the question whether it was violated by the defendants, and the further question when it was broken by them, if at all, that it will conduce to clearness of discussion to treat these questions together.

On receiving from defendants their letter of the 7th of September, repudiating the contract, the plaintiff wrote them that he expected them to carry out the agreement, and that he would give them further time for considera-

tion. In this letter, which was written September 9th, he says, among other things: "Altogether, I am inclined to defer my conclusions until you have taken time to review the transaction, and see the unfavorable light your letter of the 7th puts you in. I certainly shall expect you to take flax as per agreement. Please let me hear from you again by return mail." On the same day he sold on the Board of Trade in Duluth five thousand bushels of flax, through brokers in that city. In his testimony he speaks of this flax as being the same flax which he had agreed to sell to defendants. He says: "When I received this letter (referring to the one dated September 7th), I sold the 5,000 bushels of flax in Duluth. I sold it to Wheeler, Carter & Co. On September 9th I telegraphed Wheeler, Carter & Co. of Duluth, relative to the sale of this 5,000 bushels of flax, as follows: 'Sell five October flax. Answer.'" Wheeler, Carter & Co. answered by wire that they had sold the flax; and the same day they confirmed their telegram by a letter, in which they explained in detail the circumstances and terms of the sale. But it is undisputed that the title to the flax sold in Duluth did not pass to the vendees in such sale, nor was possession thereof delivered at any time during the month of September. The contract was merely an executory contract for the sale of five thousand bushels of flax, to be delivered in October. On the 11th of September the plaintiff, not having received from the defendants any answer to his letter of the 9th, again wrote them; and on the 13th they sent him a reply, in which they reiterated their purpose to treat the alleged contract as possessing no binding force. In this letter they said: "We expressly deny that any contract exists which obligates you to deliver to us, or we to receive from you, flax, at any time, or at any price." This closed the correspondence between the parties. The plaintiff did not thereafter inform the defendants that he elected to treat their second refusal to recognize the contract as a breach thereof; nor did he advise them, after their last refusal, that he had decided to exercise his option to insist upon the fulfill-

ment of the agreement before September 30th. The contract gave him the option to call for performance at any time during the month of September. This action was not commenced until after the 30th of that month.

We will first consider the case as though there was a fixed time for performance of the agreement, and that that time was September 30th. Under the English doctrine, which has apparently met with much favor in this country, the plaintiff, even assuming that the day for delivery of the flax was September 30th, and that he had no right to call for an earlier performance of the agreement, might have elected to treat the defendants' premature refusal to carry out the contract as an immediate breach thereof. *Hochster* vs. *De La Tour*, 2 El. & Bl., 678. But he did not so elect. On the contrary, he wrote the defendants that he would give them time to reflect and then determine what they would do, but that in any event, no matter what their decision might be, he would hold them to the contract. His words were: "I shall expect you to take flax as per agreement." Although the English courts have, in our judgment, departed from sound principles in holding that mere talk is a breach of a contract, despite the fact that the time for performance thereof has not arrived, yet they have not violated justice as well as legal principles by putting it in the power of the party to an agreement, who does not wish to fulfill it, to force a breach upon the other party before the day for performance has arrived, and thus escape the perhaps more serious consequences which might flow from a breach at the time of performance, by selecting such a season for a premature breach thereof as would make the damages comparatively light. In England the innocent party may treat a premature refusal to perform as a present breach, but he is not bound to do so. If he elects to ignore such refusal, the agreement, so far as the question of the violation of it is concerned, stands precisely the same as though no word had been uttered by the other party. If anything occurs which would have released that party from the obligation of the agreement

had he remained silent, he is released notwithstanding his premature repudiation thereof. It follows, too, that if then the then innocent party thereafter violates the contract the other party may take advantage of such violation of the agreement, just as he could have taken advantage of it had he not himself prematurely refused to respect the binding force of such agreement. All the adjudications which follow what may, for convenience, be denominated the "English doctrine," indorse this qualification of that doctrine, and it is repeatedly recognized by the English tribunals themselves. *Frost* vs. *Knight*, L. R., 7 Exch., 111; *Roebling Sons' Co.* vs. *Lock-Stitch Fence Co.*, 130 Ill., 660, 22 N. E. Rep., 518; *Kadish* vs. *Young*, 108 Ill., 170; Lawson Cont., section 440; *Zuch* vs. *McClure*, 98 Pa. St., 541; *Avery* vs. *Bowden*, 5 El. & & Bl., 714; *Reid* vs. *Hoskins*, *Id.*, 729. In *Frost* vs. *Knight*, Lord Chief Justice Cockburn said: "The law with reference to a contract to be performed at a future time, where the party bound to perform announces, prior to the time, his intention not to perform it, as established by the cases of *Hochster* vs. *De La Tour* and *Harbour Co.* vs. *Xenos* (13 C. B. (N. S.), 825), on the one side, and *Avery* vs. *Bowden*, *Reid* vs. *Hoskins*, and *Barnick* vs. *Bulba* on the other side, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any circumstances which would justify him in declining to complete it." We are, therefore, clear that if plaintiff's letter of September 9th is to control, the contract was not broken September 7th. The plaintiff, in and by that letter, elected to treat the contract as unaffected by the letter of September 7th, written him by the defendants.

But it may be urged that other circumstances show that the plaintiff had elected on September 9th to treat the contract as broken by the defendants by their first letter dated September 7th. In his complaint the plaintiff alleges that he made the sale of the five thousand bushels of flax in Duluth for the purpose of fixing at that time the amount of defendants' liability for damages, the price of the flax being at that time daily on the decline. The averment of the pleading on this point is as follows: "That immediately after the defendants had so repudiated the said agreement and refused to accept the delivery of the said flax and refused to pay for the same, as provided by and in the said agreement, and on or about the seventh day of September, A. D. 1895, the plaintiff, in order to protect the defendants against loss as much as possible, in view of the facts and circumstances incident to the said agreement and the said breach thereof, the market price of flax being then daily on the decline, sold the said five thousand bushels of flax at the best market price obtainable, and which he could obtain for the same." Taking plaintiff's allegation in connection with this testimony, there is much to show that he had elected to proceed on the theory of a breach of the contract on September 7th, the day when the defendants wrote their first repudiation of the agreement. But the sale of the five thousand bushels of flax in Duluth on September 9th does not purport to be a sale of the particular flax which plaintiff had contracted to sell the defendants, nor is there anything to indicate that plaintiff's purpose in selling it was to fix the defendants' damages, on the theory of a then breach of the contract, aside from his allegation in the complaint. He never at any time disclosed to the defendants any such purpose, nor did he ever advise them at all that he had sold their flax. On the contrary, he distinctly informed them in his letter of September 9th that he did not consider their letter of September 7th as a breach of the agreement, but that he certainly would expect them to take the flax according to the contract. His election to ignore their premature refusal, and to

treat the agreement as unaffected by anything they had said, is conclusively shown by his letter of September 9th; and thereafter the defendants might have recalled their refusal and have proceeded with the performance of the agreement, despite anything the plaintiff might in the meantime have done. His undisclosed sale of the flax in Duluth could in no manner affect their right to hold him to his avowed purpose to regard the agreement as continuing in unimpaired force. Moreover, we should reach no different conclusions, even if we should find that plaintiff had not in express terms asserted that he would not treat the contract as broken. We are confident in the soundness of our view that the English doctrine that a refusal to perform a contract before the period of performance by either party has arrived, constitutes a breach thereof, is violative of legal principles, and leads to most incongruous results. This point, however, we will discuss in a later portion of the opinion.

But it is strenuously urged that plaintiff cannot recover because he has rescinded the contract, and also because he had himself broken it, while it remained unbroken by the defendants. The sale in Duluth is relied upon as establishing the recision by him of the agreement. We are concerned in this case with only the question of recision based on mutual consent. It is not a case where one party has the right to rescind an agreement for the fraud of the other, or for other legal reasons of like character. When one party to an agreement has violated its obligations in a particular that goes to the root of the agreement, then it is true that the other party may treat his conduct as an offer to rescind, and may acquiesce in the desire so manifested to abandon the contract. In such a case the parties unite in a mutual release of the obligations which reciprocally bind them. So, too, when one party to an agreement expresses, even before the time for performance has arrived, his desire to escape the burdens of the agreement, he thereby offers to discharge the other party from the obligations thereunder resting upon him; and such party may treat such conduct as an

overture for recision, and assent thereto. Doubtless, the plaintiff, after receiving from the defendants their letter of September 7th, might have written them that he considered the contract as canceled, and thereafter it would have been forever extinguished for all purposes. Possibly he might have rescinded without performing any overt act, or making any statement to manifest his purpose. But that he never intended to rescind the agreement is too clear to admit of doubt. His letter of September 9th shows that he had no thought of rescinding, and thereby releasing defendants from liability. So do the allegations of his complaint. Although his letter is inconsistent with the averments of his pleading that he sold the flax on a theory of a present breach of the contract, yet it is to be noticed that nowhere does he assent to a recision thereof. His attitude is at all times that he will rigidly hold the defendants to the obligations of their agreement. In his letter he tells them that he will hold them to it, by this statement that he will insist on performance on their part. In his pleading he alleges that he intended to hold them to it when he sold the flax in Duluth, for he sold it with the express purpose of fixing their damages for a breach thereof. However much he may have been mistaken as to his legal right to sell at that time and in the manner in which the sale was made, for the purpose of fixing the measure of damages, he clearly never meant to acquiesce in the repudiation of the contract by the defendants, and thus assent to a recision thereof. But if, while the agreement remained in full force the plaintiff himself violated its terms, then it is obvious that the defendants may take advantage of this breach as a perfect defense. They may elect to treat his breach of contract as warranting a recision thereof by them, or they may consider it as a breach rendering him liable for damages. In either event they would have a perfect defense to this action. It is therefore necessary to determine whether by the sale of the flax in Duluth on the 9th of September, the plaintiff himself violated his agreement to deliver the flax to the defend-

ants. It is not pretended that he violated it in any other manner. The plaintiff did not agree to deliver any particular five thousand bushels of flax to the defendants. All that he was called upon to do, to fulfill his obligation, was to deliver the specified number of bushels of flax, of the quality and grade designated in the contract, without reference to the place where it was raised or the question whether it was owned by the plaintiff at the time the agreement was entered into. But it is said that it appears from the plaintiff's testimony that he segregated five thousand bushels of flax from the common mass of the flax raised by him on his farm, and then sold that particular flax in Duluth, as being the identical property he had agreed to sell the defendants. It is true that he speaks of selling the same flax that he had agreed to deliver to the defendants, and the allegations of his complaint are to the same effect. But it is evident that the segregation of this flax was purely mental. He did not in fact set apart any particular five thousand bushels as the property he had obligated himself to deliver to the defendants, and then agree to sell the same property in Duluth. At that time none of his flax had even been threshed. But even if we should assume that plaintiff had actually set apart a particular five thousand bushels, as the flax he was subsequently to deliver, and that thereafter he had sold and delivered it to a third person, this would not of itself constitute a breach of his contract. The selection by the vendor of the property he intends ultimately to deliver under a contract is not irrevocable, where he has the choice, and the vendee does not unite with him in such selection. Despite the fact that the vendor has set apart the property as the particular property he will finally deliver, he may change his mind before the time for delivery arrives, and substitute other property in place of that which he had tentatively selected. The vendee acquires by such an *ex parte* selection no vested right to insist that that is the particular property which must be delivered to him by the vendor to fulfill the conditions of the contract. All he can de-

mand is that, when the time for performance arrives, property of the description and quality specified in the agreement shall be delivered to him. The implied understanding of the parties is that the vendor shall have until the day for performance to determine what specific property he will deliver. Any selection made by him before that time is revocable by him. The rights of the vendee are in no manner affected by such selection or by the vendor's change of mind. He has no cause for complaint, provided, at the time prescribed in the agreement, property of the kind and quality of the property therein specified is delivered to him in strict accordance with the provisions thereof, whatever vacillations of purpose may have characterized the conduct of the vendor in the meantime. Should a grocer, receiving from a customer an order for a barrel of flour of a particular brand, to be delivered the following day, select, in the absence of such customer, a barrel from a number of barrels in stock, and direct that that barrel be taken to the customer's house the next day, it certainly would not be a breach of the contract for him subsequently to sell it and substitute another barrel in its place; the sale and substitution both taking place before the time for delivery according to the agreement had arrived. Indeed, it is questionable whether a sale and delivery of property by the vendor before the day for delivery under an executory contract has been reached is a breach of such contract, even in cases where the specific thing to which the contract relates is agreed upon by the parties. If A. agrees to sell and deliver to B. at the end of thirty days a particular horse, for a price named in the contract, can it be said that A. has put it out of his power to perform the agreement by selling and delivering to C. the same animal twenty days before B. can call for the performance of the contract by A.? How can B. say, without possibility of error, that A. will not be able to perform his agreement when the time for performance arrives? May not A. repurchase the horse in time to fulfill his compact with B.? See opinion of Denman, C. J., in *Lovelock* vs.

Franklyn, 8 Q. B., 371; 2 Pars. Cont., 666, 667. But see *Heard* vs. *Bowers*, 23 Pick., 460. Besides, on what principle can be based the doctrine that the certainty that a party will not be able to perform his agreement when performance by him is due, is equivalent to a present breach of the contract, although, as a matter of fact, he has not violated, and cannot violate, the contract until the future day for fulfillment has been reached? It is by no means certain that the fact that a party has put it out of his power to perform a contract when the day of performance has arrived is a breach thereof, or whether the utmost effect of such an act is merely to make inevitable a future breach of the agreement. Neither can it be said in every case that the bare fact that the vendor in an executory contract of sale has, before performance is due, sold the very property to which the executory contract relates, demonstrates the certain inability of the vendor thereafter to make delivery in the future in accordance with the terms of his promise.

But in the case at bar it does not even appear that the plaintiff had sold the flax he had agreed to sell to the defendants. The second contract, like the first, was executory. It was an agreement which by its very terms was not to be performed until after the time for performance of the contract with the defendants had passed. The Duluth contract provided for delivery in October. It is therefore clear that plaintiff had not divested himself of the title to the flax, or agreed to deliver possession thereof to the Duluth parties at any time prior to the time for delivery to defendants under his contract with them. And it is an undisputed fact that he did not deliver any such flax to the Duluth parties until long after the day for delivery to the defendants had passed. Indeed, all the flax called for by the Duluth contract had not been delivered at the time this case was tried. It is therefore apparent that, during the entire period between the making of the contract with the defendants and the time for performance thereof, according to its terms the plaintiff had not parted with the title to or possession of the five thousand bushels of flax, even assuming that

the contract with defendants related to a particular five thousand bushels. Conceding that the two contracts both related to the same property, yet it is obvious that it cannot be said that the mere fact that plaintiff could not fulfill his agreement with defendants without being guilty of a breach of contract with the Duluth parties establishes the proposition that he had placed it beyond his power to carry out his agreement with the defendants. He was absolutely master of the situation. He could break either contract he saw fit to break, and perform either contract he saw fit to perform—subject, of course, to legal liability for such breach. But it was not even necessary for him to violate his agreement with the defendants in order to fulfill his contract with the Duluth parties, even asuming that he had agreed to sell a particular five thousand bushels to the defendants, and had in mind the same flax when he made the Duluth contract. In that contract he did not bind himself to deliver any particular five thousand bushels of flax, but on the contrary, to deliver any five thousand bushels of a certain grade, which he might tender in fulfillment of the contract. He may have considered that he was selling the five thousand bushels he had agreed to sell the defendants, and yet he did not bind himself to sell only this flax to the parties in Duluth. At no time, therefore, did he divest himself of the title to the particular flax he had agreed to sell to defendants, assuming the specific flax to have been pointed out, or the possession thereof, or bind himself to sell it at all to the parties in Duluth.

When plaintiff wrote to defendants, on September 9th, stating that he would give them further time to consider their refusal to recognize the contract, his attitude was that he did not elect to treat their first letter, to which his letter was in answer, as constituting a breach of the contract. But he did not thereby bind himself not to consider any subsequent repudiation by them of the agreement as a violation thereof. Accordingly we would be compelled to hold that, on the receipt of their second letter, plaintiff was in a position to insist that defendants had broken the contract, if we should adopt the English rule. As before indicated, we

deem it indefensible on principle, nor are we able to discover how it subserves business convenience, or in what respect it is more just than the contrary doctrine. In the country in which it had its origin, it was not at first recognized as the correct rule of law. In *Phillpotts* vs. *Evans*, 5 Mess. & W., 475, Parke B., said: "The notice that he will not receive the wheat amounts to nothing, until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract." "I think no action would have then lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendants would then receive it." In *Lehigh* vs. *Paterson*, 8 Taunt., 540, the defendant had until December 31st in which to deliver the goods contracted for. On October 1st, he notified plaintiff that he would not carry out his contract. The question was whether the market value of the goods on October 1st or December 31st should be taken into consideration in fixing the plaintiff's damages. The court ruled that the value on December 31st was the value to be ascertained in determining the damages, and the decision was placed on the ground that, despite the premature repudiation of the contract by the defendant, he might thereafter have delivered the property at any time up to December 31st. Dallas, C. J., said: "The defendant had a right to deliver the tallow at any time before 12 o'clock at night on the 31st of December." Parke, J., said: "The defendant might have delivered the tallow at any moment up to the 31st of December, and the price on that day should have regulated the verdict of the jury." In *Ripley* vs. *McClure*, 4 Exc., 359, the court said, in reference to the contention of counsel for defendants, that the refusal on the part of the defendants to accept the goods, the refusal being made before the time for performance had arrived, was no more than an expression of intention, which could be retracted: "And we think that, if the jury had been told that a refusal before the arrival of the cars was a breach, that would have been incorrect. We consider that point rightly decided in *Phillpotts* vs. *Evans*, 5 Mess. & W., 475." Mr.

Benjamin, in his work on Sales, declares that "the date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract and to refuse accepting the goods." Volume II., section 1118. In the very case in which the modern English doctrine was first promulgated (*Hochster vs. De La Tour*, 2 El. & Bl., 678), Lord Campbell clearly recognizes the general rule that until the time for performance has arrived there can be no breach, by the assertion that it is not the universal rule, and by proceeding to point out the exceptions to it. He seems to have treated the case before him as an exception to the general rule. And in *Frost* vs. *Knight*, L. R., 7 Exc., 111, 114, Lord Chief Justice Cockburn declares, in so many words, "that there can be no actual breach of the contract by reason of non-performance so long as the time for performance has not yet arrived." In *Roper* vs. *Johnson*, L. R., 8 C. P., 167, the doctrine laid down in *Hochster* vs. *De La Tour* is spoken of as a novel doctrine. While the court in *Frost* vs. *Knight*, L. R. 7, Exch., 111, treats the rule enunciated in *Hochster* vs. *De La Tour*, as settled law, yet when *Frost* vs. *Knight* was before the court of exchequer the majority of that court (Kelly, C. B., and Channall, B.) vigorously assailed the anomalous doctrine which was applied in the Hochster case. See L. R., 5 Exch., 322. It is so obvious that, unless some obligation is violated by a party, he cannot be said to have broken his contract, that Lord Chief Justice Cockburn in *Frost* vs. *Knight*, was obliged to assume, in order to support his reasoning in that case, that there was an implied understanding that neither party should sever the contractual relation, and that the premature refusal to perform was a violation of this implied understanding. The Lord Chief Justice says: "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may

be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must, of course deprive him. It is therefore quite right to hold that such announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly." But that is a strange mode of reasoning which assumes a breach for the purpose of establishing a breach. Lord Cockburn asserted that the contractual tie was severed, for the purpose of proving that the contract had been violated. Unless the contract calls for a continuance of the willingness of a party to perform it during all the time between the execution thereof, and the day of performance, his mere expression of a purpose not to fulfill its obligation is not a breach of such contract. But what interest has a vendor in a contract for the sale of property in the unchanged purpose of the vendee to carry out the agreement? The only matter which concerns him is the willingness of the vendee at the time specified in the contract to accept and pay for the property. There is always the possibility that either party to an agreement may violate it when performance by him is due. This possibility is not converted into a certainty by his premature refusal to fulfill its obligations. He may repent his hasty decision. After such an anticipatory disavowal of the contract there still remains, as before, the possibility both of ultimate performance and of ultimate violation of the agreement by the one who has threatened, but only threatened, to ignore it. By a premature repudiation the rights of the other party are not in any degree affected. He still has a right to insist upon the performance of the agreement at the appointed time, or that the other party shall pay damages for the breach of the contract. This was the extent of his right before the other party had spoken a word inimical to the agreement, and he continues to enjoy this right despite such premature repudiation.

How it can be asserted, as Lord Chief Justice Cockburn asserted in *Frost* vs. *Knight*, that the premature re-

pudiation of a contract deprives the other party of all advantage under it, is inexplicable. He, in the very same opinion, declared that the innocent party, so far from being deprived of any advantage, could elect to treat the agreement as unimpaired. The warning, which leaves the agreement unaffected, is a positive benefit, and not a detriment to the other party. Should the would-be violator of the agreement keep his purpose to himself, the other party would be in a situation not so favorable. Suppose, for instance, that the vendor had agreed to sell property, fluctuating in value, at a specified time. He may discover subsequently to the making of such contract that the vendee has become insolvent and does not intend to perform the agreement; yet so long as such vendee keeps silent the vendor is obliged to stand to the agreement, taking all the risk that, if the market should turn against him at the time for delivery, he must lose, and yet knowing that, if the market should prove favorable to him, the vendee will break the contract, and leave him (the vendor) only a worthless cause of action for damages against a bankrupt. Under such circumstances a statement by the vendee that he will not carry out the contract would place the vendor in a more favorable position, for it would enable him, at his option, to rescind the contract, thus escaping the risk of loss, in a case where he could not hope to reap any benefit from the agreement should the market be favorable to him at the time for performance. The fundamental inquiry is, of course, in every case, whether any essential provision of the contract, either express or implied, has been violated. If the agreement is for the sale of property at a fixed time in the future, the intermediate expression by either party of a purpose not to stand by the contract is not a breach thereof, because he has not thereby done anything in violation of his promise, to the detriment of the other party. But, if the contract is to marry at a future date, a different case is presented. The agreement to marry connotes the further agreement to remain affianced until the performance of the contract has estab-

lished the still closer relation of husband and wife. Such an agreement establishes a distinctive relation, known as "betrothment." He who destroys this relation—though it be done before the period of marriage has, under the terms of the contract, arrived—violates the contract in a vital element; and the violation is none the less actionable because the promise to remain engaged in the meantime is implied, and not expressed. The contract is an entirety, and, when broken, is broken in its entirety. It is on this ground that the decision in *Frost* vs. *Knight*, L. R., 7 Exch., 111, 114, is placed by the Lord Chief Justice. He says: "It is next to be observed that the law, as settled by *Hochster* vs. *De La Tour* and *Harbor Co.* vs. *Xenos*, is obviously quite as applicable to a contract in which personal *status* or personal rights are involved as the one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise, with reference to domestic relations, and possibly pecuniary advantages, as also to the social *status* accruing on marriage, but a new *status*—that of betrothment—at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attach to it by the canon law and the law of any other country. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other. Neither can, consistently with such relation, enter into a similar engagement with another person. Each has an implied right to have this relation continued until the contract is finally accomplished by marriage." And Byles, J., concurs in the judgment of the court on the ground that the implied agreement to remain betrothed until marriage had been violated. He says: "An express precontract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or

status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed, or whether contingent on a future event. So, I conceive, the man cannot, during the stipulated period of betrothment, without a breach of contract, marry another woman, though she may die in the meantime. So for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me to be equally a breach of the contract; for it puts an end to the condition of betrothment, which, according to the contract, was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract."

A review of the English decisions will disclose the fact that only in a single case has this modern English doctrine been applied where the enforcement of a contrary rule would have led to a different decision. This is *Hochster* vs. *De La Tour* (decided in 1853), 2 El. & Bl., 678. In that case it appeared that the plaintiff and defendant, in April, 1852, had entered into a contract of service. The plaintiff was to serve the defendant as a courier in his travels on the continent, for a period of three months, commencing June 1st, 1852. On the eleventh day of May, 1852, defendant notified plaintiff that he would not perform the agreement, and on the 22d of the same year the action to recover damages for breach of the contract was commenced. The question was squarely raised, by the contention of counsel for the defense, whether what had been said by the defendant constituted a present breach of the agreement. The Court of Queen's Bench held that it did. Lord Campbell says: "The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it until the day when the actual employment as courier in the service of the defendant was

to begin, and that there could be no breach of the agreement before that day, to give a right of action. But it cannot be laid down as a universal rule that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement until the day for the doing of the act has arrived." If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable for an action for breach of promise of marriage. *Short* vs. *Stone*, 8 Q. B., 358. If a man contracts to execute a lease on and from a future day, for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford* vs. *Tiley*, 6 Barn. & C., 325. So, if a man contracts to sell and deliver specific goods on a future day and before the day he sells and delivers them to another, he is immediately liable to an action, at the suit of the person with whom he contracted first to sell and deliver them. *Bowdell* vs. *Parsons*, 10 East, 359. One reason alleged in support of such an action is that the defendant has, before the day, rendered it impossible for him to perform the contract at the day. But this does not necessarily follow, for prior to the day fixed for doing the act the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveler and courier, from the day of the hiring until the day when the employment was begun they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounced the engagement." "The man who wrong-

fully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait until the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party and cannot be prejudicial to the wrongdoer." So far as Lord Chief Justice could perceive, an analogy between the engagement between the plaintiff and defendant in that case and an engagement between a man and a woman who are betrothed, his faculty for discovering similitudes is certainly phenomenal. The balance of his reasoning is that the rule that is there laid down is more convenient than the other rule, which squares with legal principle. There is a tacit confession through this entire discussion of the question that the decision is at war with settled principle. And in *Frost* vs. *Knight* also, the argument of convenience appears to have had a great weight with Lord Chief Justice Cockburn. In *Dugan* vs. *Anderson*, 36 Md., 567, the court, while not deciding the question, seems to have been governed in the utterance of its *dictum* on the subject by considerations of convenience. We agree with the Massachusetts Supreme Court that the argument of convenience should have no weight as against the demands of legal principle. In *Daniels* vs. *Newton*, 114 Mass., 530, the court said: "Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before the argument can properly have weight, the point to be reached must be first shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some principle, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of, or prevented from acquiring, that which he is entitled to have

or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or complying with performance on his part at a time when, and in the manner in which, he is entitled to perform it, or have it performed." And in *Frost* vs. *Knight*, L. R., 7 Exch., 111, Lord Cockburn declared that the argument founded on convenience should not control, but should be considered only in connection with arguments founded on settled doctrines of the law. He, however, was able to discover, as we have already pointed out, a basis for the English rule in elementary principles; but we are unable to agree with him in this respect, and such being the case, we have his authority for rejecting the argument of convenience when it stands alone as the supporter of this novel rule. Moreover, we are unable to see wherein business convenience is subserved by the English doctrine. It is subserved thereby only on the theory that to establish a rule for the special advantage of the party who does not proclaim his purpose to violate the contract is to advance the convenience of the business world. The option, under such doctrine, is with such party to treat the premature declaration as a breach of the agreement, or to refuse to so treat it. He may decline to consider it a breach and hold the other party to the contract, the same as though no word inimical thereto had been spoken. Under the guise of furthering business interests, the English rule unfairly discriminates against the party who speaks and in favor of the one who is silent. The latter may secretly intend not to carry out the agreement. The former may be actuated—indeed, he often is prompted—by the laudable motive of giving the other party timely warning of what he deems at the time his inevitable inability to perform the agreement. On what

principle of justice, then, should the law thus discriminate between the parties? If this rule be adopted, then it will not infrequently happen that a party has been held liable for a breach for merely admonishing the other party that a breach is inevitable, when, had he remained silent, no liability could have been enforced against him, because the contract would have been extinguished before the day for performance could arrive, by reason of the death of one of the parties thereto—the contract being for personal services—or because of the destruction before that day, without the fault of any one, of the subject matter of the agreement. By being allowed to treat the agreement as broken, the party can enforce a liability for substantial, and perhaps very heavy, damages; whereas if he had been forced to wait until it should be ascertained whether the other party would in fact perform his agreement, the damages then would have been merely nominal, or the latter might have escaped all liability, by reason of the extinguishment of the contract before the day of performance arrived, for the reasons already mentioned. Indeed, the party who sues might himself have been unable to perform when the time for performance was reached, and might have been put in default by demand of the other party that the agreement be carried out. If the doctrine of the Hochster case be sound, then one who has agreed to enter the service of another two years in the future may elect to treat as a breach of the contract an immediate refusal by the employer to fulfill the same, and he may then sue, and the case may be tried before the period for entering upon the discharge of his duties under the contract has arrived. In such a case he would recover full wages; it being impossible to show what he had earned or could have earned during the time he was to have worked for the defendant. And yet subsequent developments may reveal the fact that, so far from being damaged, he was positively benefited, by the fact that he did not enter the defendant's employ. He may during that period earn double the wages he was to have received under the contract, and this, too, in

addition to that which he has already collected without doing a stroke of work therefor. Nay, the death of the employer before the day for commencing the performance of the agreement arrives, working an extinguishment thereof, may show that but for his statement the plaintiff could never have collected a dollar. Undoubtedly, the party to whom the refusal is communicated may treat it as an overture for a consent by him to recision, and rescind the contract. But he has no right to construe as a present breach words which only disclose the probability of a future breach. Many of the cases which appear to support the doctrine of the Hochster case are distinguishable on this ground of recision. It will be found on an analysis of them that all that the party to the contract was seeking to do by his action was to recover on a *quantum meruit*, on the theory that he had rescinded the contract on being informed by the other party that he did not intend to carry it out. The court did not in these cases hold that the contract was broken, but merely that, it having been rescinded by mutual consent, the party who had parted with anything of value in the performance of the agreement could recover the value thereof, on an implied promise to pay the same. In *Planche* vs. *Colburn*, 8 Bing., 14, the plaintiff had a contract with the publishers of a periodical, to write a series of articles therefor. The publishers having discontinued the publication, he treated their conduct as justifying a recision, and rescinded the contract. The action was to recover the value of work already performed by him, at defendants' request, in writing a portion of the articles. It was on this theory that a recovery was sustained. In some of the cases, the party to whom the notice of refusal was given had the option to call for a performance at any time; and, of course, he could elect to regard the time of performance as having arrived, and then treat the refusal as a waiver of tender of performance, and in this way hold the party as for a present breach of the agreement. This element existed in the following cases: *Lovelock* vs. *Franklyn*, 8 Q. B., 371; *Bowdell* vs. *Parsons*,

10 East, 359; *Newcomb* vs. *Brackett*, 16 Mass., 161; *Windmuller* vs. *Pope*, 107 N. Y., 674, 14 N. E. Rep., 436; *Short* vs. *Stone*, 8 Q. B., 358. Of the English cases, we have seen that *Phillpotts* vs. *Evans*, 5 Mess. & W., 475; *Ripley* vs. *McClure*, 4 Exch., 345; and *Leigh* vs. *Paterson*, 8 Taunt., 540; are opposed to the Hochster case. Mr. Benjamin also, in his work on Sales (an English work), states the rule the other way, as we have already seen. 2 Benj., Sales, section 1118. In *Lovelock* vs. *Franklyn*, 8 Q. B., 371, Lord Denham intimated that where the time for performance is fixed, the fact that a party has in the meantime incapacitated himself from performing the contract will not constitute a breach thereof. *Frost* vs. *Knight*, L. R., 7 Exch., 111, was an action for breach of promise to marry, and stands, as we have seen, on peculiar ground, not applicable to actions for breach of contract generally. And in the Court of Exchequer the doctrine in the Hochster case was powerfully assailed by the majority of the court. L. R., 5 Exch., 322. *Short* vs. *Stone*, 8 Q. B., 358, was also such an action. In this case the defendant had not only broken the engagement, but had actually married another person. *Planche* vs. *Colburn*, 8 Bing., 14, was not an action for breach of contract, but to recover on the theory of a recision. In *Harbour Co.* vs. *Xenos*, 13 C. B. (N. S.), 825, the action was not brought until after the time for performance had arrived. The defendant never retracted his premature refusal. Therefore, all the court was called upon to decide in that case was that when the day for fulfillment of the agreement was reached the unwithdrawn refusal was a waiver of tender of performance by the plaintiff, and enabled it to sue for breach of contract, the same as though such tender had been made and refused. There was no occasion for alluding in this case to the doctrine laid down in the Hochster case. In *Avery* vs. *Bowden*, 5 El. & Bl., 714, and *Reid* vs. *Hoskins*, *Id.*, 729, the court held that the plaintiff could not recover, because he had declined to treat the premature refusal of the other party as a breach. The same result was reached in these cases

that would have been reached if the doctrine we believe to be sound had been applied. In *Roper* vs. *Johnson*, L. R., 8 C. P., 167; and *Brown* vs. *Muller*, L. R., 7 Exch., 319, we observe the practical working of the rule promulgated by the Hochster case. Having violated legal principles once, in deciding that case, the courts were forced to violate them a second time, in laying down the rule relating to the measure of damages in such cases. Instead of fixing the value at the time of the premature breach as the element to be considered, the court held that the value at the time for performance, as fixed by the agreement, must be considered. In *Roper* vs. *Johnson* the court, after speaking of the doctrine of the Hochster case as a novel doctrine, says: "The difficulty which presents itself here is introduced by the comparatively recent case of *Hochster* vs. *De La Tour*, the first case which decided that in the case of an executory contract the refusal of one party to perform the contract would justify the other in at once treating such refusal as a breach and suing for damages. That case has been distinctly recognized on subsequent occasions, and we must now assume it to be the law. It has undoubtedly introduced a difficulty in the assessment of damages in similar cases." Judge Keating, after referring to the rule the court would adopt in that case as to the proper measure of damages, said: "I think it is the better and the safer rule, though I am free to confess that the matter is by no means divested of difficulty—a difficulty occasioned by the novel doctrine introduced by the case of *Hochster* vs. *De La Tour*." It must be admitted that the case of *Ford* vs. *Tiley*, 6 Barn. & C., 325, strongly supports the decision in the Hochster case.

In this country there appears, from a superficial view of the decisions, to be a great mass of authority in favor of the English doctrine. But a review of adjudication on this side of the water will reveal the fact that there is very little in the way of express authority in America upholding the English rule. The case of *Burtis* vs. *Thompson*, 42 N. Y., 246, may be dismissed with the observation that it was an

action for breach of promise to marry. In *Howard* vs. *Daly*, 61 N. Y., 362, there is a dictum by Commissioner Dwight that the doctrine in the Hochster case is sound. But the facts did not call for any decision on this point, as the defendant had refused to allow the plaintiff to enter upon the performance of her contract of service after the time for performance had arrived. The other members of the court expressly refused to state their views whether the English rule could be sustained in principle. (See page 378.) In *Bunge* vs. *Koop*, 48 N. Y., 225, all the court decided was that a premature refusal, unretracted, constitutes a waiver of tender of performance, when the time to fulfill the contract arrives, and that thereafter the plaintiff may sue for breach without showing an offer to perform. In *Freer* vs. *Denton*, 61 N. Y., 496, and *Shaw* vs. *Ins. Co.*, 69 N.Y., 293, the court expressly refused to determine whether the English rule should be followed. In *Ferris* vs. *Spooner*, 102 N. Y., 10, 5 N. E. Rep., 773, the defendant had broken his contract after he had entered upon the performance thereof. The court said. "When, therefore, he repudiated the further performance of the contract, the plaintiff was discharged from all obligation to either, and set at liberty to enforce his securities for the money already advanced. Obviously, demand of payment was not essential to a cause of action." In *Windmuller* vs. *Pope*, 107 N. Y., 674, 14 N. E. Rep., 436, the court appears to have recognized the English rule, but the case does not show whether the suit was brought before or after the day for performance had arrived. Moreover, the time for the vendors to commence delivery by shipment of the property agreed to be sold had arrived at the time the vendees had declared their purpose not to accept the property under the contract. The vendors appeared to have had an option to deliver at any time between certain dates. When the vendees repudiated the agreement, the time when the vendors might have insisted upon delivery had arrived, although they could, at their option, have made delivery at a later date. The vendors having a right to begin performance at the time the vendees refused to receive the property, the former might, of course, treat

the repudiation as a breach. It was not a premature repudiation of the contract, but one which occurred after the time had arrived when the vendors had a right to insist on performance thereof. All that the court held in *Crist* vs. *Armour*, 34 Barb. 378, was that premature refusal, unwithdrawn at the time for performance, was a waiver of an offer of performance at that time. In *Donovan* vs. *Sheridan*, (Super. N. Y.), 24 N. Y., Supp., 116, it appeared that the point that a premature repudiation was not a breach was not made at the trial, and the court declared that therefore it would not be considered. But the court did utter a dictum in favor of the English rule. However, it was based on New York decisions which had not at that time, at least, settled the law in that State in favor of such rule. In *Gray* vs. *Green*, 9 Hun., 334, the court said: "The effect of a mere refusal has been stated to be that if, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, this of itself does not amount to a breach thereof; but, if such expression of intention remains unretracted when the time arrives for the other party to perform his part of the contract, this fact will dispense with such performance." In *Crabtree* vs. *Messersmith*, 19 Iowa, 179, the defendant broke the contract of sale after the time for performance had arrived, by returning the property, after possession thereof had been delivered to him. While the English rule is referred to, it is obvious that no question of premature breach was involved. In *Holloway* vs. *Griffith*, 32 Iowa, 409, the action was for breach of promise to marry, and the case therefore belongs to the class of cases in which a premature refusal operates as a breach of the implied agreement to continue betrothed until marriage. In *Roebling Sons* vs. *Lock-Stitch Fence Co.*, 130 Ill., 660, 22 N. E. Rep., 518, the defendant refused to perform after it had entered upon the performance of the agreement. In *Kadish* vs. *Young*, 108 Ill., 170, the court held that the premature refusal to perform was not a breach, because the other party to the contract had not elected to treat it as a breach. The same result would have been reached in that case if the English

doctrine had not been applied. In *Fox* vs. *Kitton*, 19 Ill., 519, all the court decided was that the innocent party may treat a premature repudiation as an offer to rescind the agreement. In *Chamber of Commerce vs. Sollitt*, 43 Ill., 523, it appeared that while the defendant announced his inability to perform before the time for performance arrived, yet he did not withdraw such refusal to carry out the agreement before such time, and the suit was not brought until the period for fulfillment of the agreement had come and passed. In *Follansbee* vs. *Adams*, 86 Ill., 14, the parties to the contract, after one of them (the plaintiff) had notified the other (the defendant) that he could not perform, adjusted the matter, and on his adjustment it was agreed that plaintiff owed the defendant a certain sum. Thereafter, plaintiff having sued defendant for failure to perform the contract, this settlement was pleaded as a defense. Of course, it was held that it constituted a perfect defense to the action. The contract was, by the act of the party, extinguished before the time for performance arrived. How could there thereafter be any liability thereunder? The court was not called upon to decide whether the plaintiff, by his premature refusal, had broken the agreement. The principle on which the decision rests is that the parties to a contract may, even before performance is due, extinguish it. The scope of the decision is enclosed in the last sentence of the opinion, "We are satisfied, after careful consideration of the whole record, that the court decided right in holding the contract rescinded." In *Railway Co.* vs. *Richards* (Ill. Sup.), 38 N. E. Rep., 773, the breach consisted of acts in contravention of the terms of the contract after the time for performance had arrived. The court, indeed, indorses the English doctrine, but what was said on the subject was pure dictum. In *Zuch* vs. *McClure*, 98 Pa., 541, the court held that a premature repudiation did not constitute a breach, as the innocent party did not elect to so regard it. The result in this case would have been the same if the English rule had not been adopted. In *Heard* vs. *Bowers*, 23 Pick., 455, the court intimated that, if a party voluntarily puts it out of his power to perform a contract

before the day of performance arrives he by that act breaks the agreement. See page 460. In *Dingley* vs. *Oler,* 11 Fed. Rep., 372, the court applied the English doctrine; and when this case was decided on appeal in the Federal Supreme Court (117 U. S., 490, 16 Sup. Ct., 850) that court intimated that it considered the English doctrine as sound, but the decision below was reversed on the ground that, even assuming that doctrine to be preferable, the facts did not bring the case within it, for the reason that no distinct repudiation of the agreement before the time for performance had been shown. In the case of *U. S.* vs. *Smoot,* 15 Wall., 36, the court, while leaning very decidedly towards the English rule, held that the case was not brought within its scope for the same reasons which govern the decision in that court in *Dingley* vs. *Oler.* In *Dugan* vs. *Anderson,* 36 Md., 567, the court, while not called upon to settle the question indicated that on the score of convenience it might, when called upon to settle the point, adopt the English rule. But, as we have already seen, it is indefensible to rest the English doctrine upon the mere ground of convenience, and in this case it appeared that the contract was broken while it was being performed. In *Hosmer* vs. *Wilson,* 7 Mich., 294, the action was brought to recover the value of labor expended on materials out of which an engine was to be constructed by plaintiff in error for defendant in error. The defendant in error had repudiated the contract while plaintiff in error was performing it. Of course, this was a breach of the agreement. No question of premature repudiation was involved. In *Platt* vs. *Brand,* 26 Mich., 175, it would seem that the plaintiff, against whom the defendants sought to set up by way of recoupment, a claim for damages for a breach of contract to furnish glass, had broken the contract after performance thereof had been entered upon, although at a time anterior to the time when delivery of the installment which he refused to deliver was due. In *Wolf* vs. *March,* 54 Cal., 228, it appeared that the written instrument sued upon was given on condition that it was not to be enforced until a certain mine should yield a profit to the defendant and that if it should not yield a

profit to him, the instrument was to be void. The defendant sold the mine, and the court held that the instrument at once became enforceable. By the act of sale the defendant had put it out of his power to make the mine yield a profit to him, and the court therefore very properly held that the instrument could be enforced without waiting future developments. In *Sullivan* vs. *McMillan* (Fla.), 8 South., 450, the refusal to go on with the contract was made after performance thereof had been entered upon. Therefore no question of premature refusal was involved. The court did not adopt the English doctrine. On the contrary, it stated that the case did not call for a decision on that point. The court said: "The case at bar does not, however, call for an expression of opinion as between the doctrine of *Hochster* vs. *De La Tour* and that of *Daniels* vs. *Newton*. It rests upon another and unquestionable doctrine. The time for performance was over when the breach complained of was committed. The contract was entire, and not severable in its character, and had been performed in part, at least; and upon a breach of the entire contract, it being committed by the defendant while the plaintiff was ready and willing to perform, the latter became entitled to recover in one action the same damages as if he had fully performed his contract." In *Maltby* vs. *Eisenhauer*, 17 Kan., 308, Justice Brewer said: "To what extent a contract may be held to be broken before the time for performance arrives may not be entirely settled. There are authorities which say that if, before the time for performing the contract arrives, the promisor expressly renounces the contract, the promisee may treat this as a breach, and may at once maintain an action in respect thereof. Several of these cases were for breaches of contracts to marry, and the court in many of them express themselves qualifiedly, and as doubtful whether the proposition was correct, as applicable generally to all classes of contracts. Be the proposition ever so sound, we think it is not applicable here." In *Grau* vs. *McVicker*, 10 Fed. Cas., 996, it was squarely decided that the premature repudiation of an agreement is a present breach thereof. The decision in this case is founded

entirely on *Hochster* vs. *De La Tour*. In *McPherson* vs. *Walker*, 40 Ill., 371, all the court decided was that a refusal to perform, not withdrawn before the time of performance, operates as a waiver of an offer to fulfill the agreement at the time stipulated therein. The court, so far from adopting the English doctrine, laid down the very rule we hold to be proper in cases of this kind: "The rule is if one, bound to perform a future act, before the time for doing it declares his intention not to do it, this of itself is not a breach of the contract; but, if this declaration be not withdrawn when the time arrives for the act to be done, it constitutes sufficient excuse for the default of the other party." In *Davis* vs. *Furniture Co.* (W. Va.), 24 S. E. Rep., 630, the court follows the English doctrine, but the question was not discussed. The leading decision opposed to the *Hochster* case is *Daniels* vs. *Newton*, 114 Mass., 530. Nor does it stand alone. It has been followed in *Carstens* vs. *McDonald* (Neb.), 57 N. W. Rep., 757, and *Clark* vs. *Casualty Co.*, 67 Fed. Rep., 222. See *Kelly* vs. *Oliver* (N. C.), 18 S. E. Rep., 698. That the English courts are not disposed to give the rule in the Hochster case very wide scope appears to be shown by the fact that nothing short of the most positive repudiation of an agreement will suffice to give the innocent party, at his option, a cause of action when the repudiation is premature. See *Iron Co.* vs. *Naylor*, 9 Q. B. Div., 648; *Avery* vs. *Bowden*, 5 El. & Bl., 714; *Reid* vs. *Hoskins*, 5 El. & Bl., 953; *Johnstone* vs. *Milling*, 16 Q. B. Div., 460.

Nothing decided by this court in *Davis* vs. *Bronson*, 50 N. W. Rep., 836, conflicts with our ruling in this case. There the plaintiffs and defendants had made a contract for the construction of a creamery. All that was held in that case was that plaintiffs could not, in the face of a refusal to accept, construct the creamery and then sue the defendant for the contract price. Their remedy was to sue for damages for breach of the contract. When one has contracted to erect for another a building, and the latter, when the time for commencing construction thereof arrives, refuses to permit the builder to enter upon his premises for the purpose of carrying out his

contract, it is obvious that the owner of the land has prevented the performance of the contract by the builder, and has therefore been guilty of a breach thereof. Indeed, there is eminent authority that notice that one will not stand by an agreement, though given before performance by him is due, is a present breach of the agreement, if at the time it is given the time for the other party to enter upon performance had arrived. *Danforth* vs. *Walker*, 37 Vt., 244; *Hinkley* vs. *Steel Co.*, 121 U. S., 264, 7 Sup. Ct., 875; *Hosmer* vs. *Wilson*, 7 Mich., 304; *Sullivan* vs. *McMillan* (Fla.), 8 South. Rep., 457, 458; *Dillon* vs. *Anderson*, 43 N. Y., 232; *Lamoreaux* vs. *Wolfe*, 36 N. H., 33; *Parker* vs. *Russell*, 133 Mass., 74. Whether this doctrine is sound, or whether the better rule is that such notice is merely a waiver of performance, irrevocable in character, inevitably involving an ultimate breach, it is unnecessary for us to decide. If one has agreed to manufacture and deliver certain goods at a specified time, and the other party has agreed to take them, it is evident that a notice not to manufacture them is not only a waiver of the manufacture of the article, but also of the tender of them, in fulfillment of the agreement, and the waiver is irrevocable. To advise a manufacturer that he need not manufacture, because the purchaser will not accept, is irrevocable to waive tender on the day for delivery, for he cannot deliver goods of his own manufacture without producing them. But, while a future breach is certain, can it logically be said that it has already taken place? Is it sound to declare, as some of the decisions do, that in such a case the performance by the manufacturer has been prevented? See *Cort* vs. *Railway Co.*, 17 Q. B., 127. But we express no opinion on this point, as it is not involved. What we do decide is that the letter of September 13th, although embodying a positive refusal to perform, did not place it in the power of the plaintiff to treat the contract as broken, assuming that September 30th was the day fixed for performance. But it is undisputed that under the contract the plaintiff might, at his option, have delivered the flax at any time during

the month of September. When he received the second letter from the defendants (*i. e.*, the one dated September 13th), it was in his power at that time to exercise his option to call for the performance of the agreement. The refusal of the defendants to perform was a standing waiver of tender of performance by the plaintiff, so long as such refusal was not withdrawn, and there is no pretense that it was ever retracted. For the purpose of establishing a party's liability for breach of contract, his refusal to perform, made at the time for performance, or made before and not withdrawn at that time, is equivalent to a then offer to perform by the other party, followed by a refusal by the party who so refuses before an offer is made. This is elementary law, and the principle is embodied in our Code. Sections 3774, 3820, subdivision 3, and section 3823, Rev. Codes. Had plaintiff been absolutely entitled to performance on the day he received defendants' second refusal to perform, he could, without tender of notice, have treated the contract as then broken. Does the fact that he had only an option to call for fulfillment of the agreement affect his right? We think not, so far as tender is concerned. All that was necessary to entitle him to insist on performance on any day prior to September 30th was notice to the defendants to that effect, and an offer to perform. But the unwithdrawn refusal to recognize the contract constituted a waiver of tender of performance. Whether it constituted a waiver of notice that the plaintiff then elected to exercise his option to make an earlier delivery of the flax, is another question. It is not claimed that the plaintiff in any manner brought to defendants' notice his purpose to exercise his option to call for performance before September 30th. To allow him to wait and watch the fluctuations of the market and then, after the last day for delivery had passed, claim that he had secretly decided to insist upon performance at a particular time prior thereto, or on the last day itself, according as his interests would be best subserved, would be a dangerous doctrine, and one that there is no necessity for adopting, seeing

that it was easy for him to manifest his election in a way that would make it irrevocable, and bring it to the knowledge of the defendants. He should not be afforded the opportunity of playing fast and loose with the rights of the other party, but should be required to declare his purpose, or be held, in the absence of notice to the contrary, to have elected to wait until the last day for performance. Unless this rule is adopted the vendor, who has an option to deliver at any time within six months, and who is notified by the other party immediately after the contract is made that such other party will not stand by the agreement, could remain quiet during this entire period, and then select such a day as the day when he had elected to call for performance, and therefore as the day of breach, as would give him the largest amount of damages. We hold, therefore, that the plaintiff could not claim that he decided to exercise his option to tender the property before the last day of performance, *i. e.*, September 30th. Indeed, he does not pretend that he is entitled to recover damages on a theory of a breach of the contract at any time between September 13th and September 30th. Proceeding on a hypothesis which to us is inexplicable under the circumstances, he seeks to hold defendants responsible for the difference between the contract price and the price he realized on the sale of the five thousand bushels of flax in Duluth on the 9th of September. That he cannot bind defendants for the purpose of fixing the damages they must pay by the sale in Duluth is obvious for two reasons: *First,* it was not made in the mode pointed out in the statute. The statute recognizing a settled rule of the common law permits the vendor in an executory contract of sale, the title not having passed to the vendee, to treat the property as the property of the vendee, for the sole purpose of fixing the measure of damages, and then proceed to sell it on the theory of the foreclosure of a vendor's lien for the purchase price. The property is to be sold in the manner pointed out by the statute for the sale of pledged property. The vendee is made liable for the deficiency,

if any. Sections 4833, 4988, Rev. Codes. But the sale in Duluth was not made in conformity with the provisions of the statute relating to the sale of pledged property. No notice of the time and place of sale was given to the defendants, as required by section 4760, Rev. Codes, nor was the sale at public auction upon the notice to the public usual at the place of sale in respect to auction sales of similar property, as required by section 4763, Rev. Codes. Another conclusive answer to the position taken by plaintiff that he could bind the defendants by the price realized on the sale in Duluth, is that the contract had not then been broken. It is only after breach that the statute permits the vendor to proceed to sell, as in case of a pledge, for the purpose of fixing the vendee's liability for the deficiency. Section 4988, Rev. Codes.

It is urged that by selling the five thousand bushels of flax in Duluth with a view of fixing the defendants' damages, the plaintiff chose his remedy, and hence cannot pursue any other remedy for damages. We are unable to discover that any question of remedy is here involved. If the vendee breaks his contract, the vendor may recover damages according to the rule laid down in subdivision 2 of section 4988, and section 5009, Rev. Codes, unless he has in fact proceeded under section 4833, and actually fixed the damages thereunder. It is only when the property has been resold in the manner prescribed by section 4833 that the deficiency fixes the measure of damages. If the property has not in fact been resold under that section, then subdivision 2 of section 4988 and section 5009 point out the true measure of damages. The right to hold the vendor responsible for damages on this theory is not cut off unless the property has in fact been "resold in the manner prescribed by section 4833." A mere attempt to proceed thereunder will not bar the right to damages according to subdivision 2 of section 4988 and section 5009. Nothing short of an actual sale in the manner prescribed by section 4833 will have such effect. Counsel first contends that damages cannot be recovered on the theory of a sale to foreclose a vendor's

lien, because the vendor failed to sell in the manner prescribed by section 4833; and yet *una et eadem flatu*, they insist that plaintiff should not be allowed damages under the other subdivision of section 4988—a claim utterly untenable if this fact be true. They would make an abortive attempt to proceed under section 4833 fatal to the recovery of any damages whatever, although the vendee has not thereby suffered any injury whatsoever. We cannot assent to a position so repugnant to the explicit language of the statute and so contrary to natural justice.

Having reached the conclusion that the contract was not broken by defendants before September 30th, this was the day for performance as the plaintiff had not elected to make delivery before that time. All that was necessary to put the defendants in default was a tender of performance, followed by their refusal. But an offer by plaintiff on the 30th of September was waived by their unretracted repudiation of the contract. He is deemed to have made it, and to have been met by a refusal. This constitutes a breach as of that day. If, then, there was an evidence tending to support the verdict as to the amount of damages, the verdict must be sustained, although directed by the court. The fact of liability is conclusively established. The defendants having requested the court to direct a verdict in their favor and the court having instructed the jury to find for the plaintiff, on his motion, the defendants must be regarded as having submitted all contraverted facts to the court for decision; no request having been made by them after their motion for a directed verdict had been over-ruled, that any question of fact be submitted to the jury. It follows that if there is any evidence at all to support the verdict, in point of damages, the judgment must be affirmed.

The defendants by their motion took the position that there was no question of fact which they desired to have submitted to a jury, and cannot complain of the decision of any question of fact on which the evidence is conflicting which the court mut be regarded as having made by instructing the jury to find for the plaintiff. After a party has moved the court that the jury be instructed to render a ver-

dict in favor, he must, if the court denies his motion specifically request that there be submitted to the jury the questions of facts which he desires to have so submitted. Otherwise he is deemed to have acquiesced in the decision of such questions by the court, and if the court directs a verdict in favor of the other party, on his motion, the defeated litigant is not in position, in case of his failure to make such requests, to claim that any issue upon which the evidence is conflicting should have been left to the decision of the jury. 2 Thomp. Trials, section 2272; *Mayer* vs. *Dean*, 115 N. Y., 550, 22 N. E. Rep., 261; *Provost* vs. *McEncroe*, 102 N. Y., 650, 5 N. E. Rep., 795; *Winchell* vs. *Hicks*, 18 N. Y., 558; *Colligan* vs. *Scott*, 58 N. Y., 670; *Merwin* vs. *Magone*, 17 C. C. A., 361, 70 Fed. Rep., 776; *Beuttell* vs. *Magone*, 157 U. S., 154, 15 Sup. Ct., 556; *Chrystie* vs. *Foster*, 9 C. C. A., 606, 61 Fed. Rep., 551; *Sutter* vs. *Vanderveer*, 122 N. Y., 652, 25 N. E. Rep., 907. It follows, as we have already said, that, if there is any evidence in the case tending to prove the amount of damages for which the verdict was directed, the defendants, not being in a position to complain that that question was not settled by the jury, are bound by the finding of the trial court, just as they would have been bound had the verdict been voluntarily rendered by the jury. On the 9th of September, plaintiff sold five thousand bushels of flax through brokers in Duluth, and realized eighty-four cents a bushel from the sale. While this evidence was perhaps competent to prove the value of the flax on the 9th of September, it has no tendency to prove its value at such a time after September 30th, as would have sufficed for the seller, acting with reasonable diligence to effect a sale. Sections 4988, 5009, Rev. Codes, fix the measure of damages in such cases. They provide as follows:—

"SECTION 4988. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him is deemed to be: (1) if the property has been resold pursuant to section 4833 the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or (2) if the property has not been resold in the manner prescibed by sec-

tion 4833 the excess, if any, of the amount due from the buyer under the contract, over the value to the seller together with the excess, if any, of the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof if the buyer had accepted it."

"SECTION 5009. In estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale."

In this case, there being no evidence tending to prove the value of the property at Kelso at such time after September 30th as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, the court had no basis, even on the theory that all issues of fact were submitted to it for decisions, for finding the value of the flax at that time. The state of the evidence was such that the plaintiff, while establishing a breach of the contract, had failed to show any actual damages. On the evidence as it stood, the most the plaintiff could have recovered was nominal damages. For the error of the court in directing a verdict for the plaintiff on the theory that the price realized by him on the sale of the flax in Duluth fixed the measure of his damages, the judgment and the order denying a motion for a new trial are reversed and a new trial is ordered. Under the facts of this case, the proper measure of damages is the difference between the price agreed to be paid for the flax and its market value at Kelso, at such time after September 30th as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, and the excess of expense, if any, mentioned in section 4988, Rev. Codes. See Revised Codes, section 5009.